No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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July 7, 1984

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MOTION OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, the American Association of Exporters and Importers ("AAEI") and Consumers for World Trade ("CWT") respectfully move for leave to file the accompanying brief as *amici curiae*. Petitioners have consented to the filing of this brief; respondents have not.

INTEREST OF AAEI AND CWT

AAEI represents the interests of nearly 1,400 United States companies nationwide, and is the only organization in the country specifically representing the interests of exporters and importers. Member companies sell a broad range of products, including electronics, chemicals, machinery, textiles and apparel, footwear, food, and automobiles. AAEI members also include businesses serving the trade community, such as customs brokers, freight forwarders, air and shipping lines, banks, and insurance firms. The promotion of fair and open world trade has been the primary mission of AAEI for the entire 62 years of its existence. For the reasons set forth below and in the accompanying brief, AAEI is concerned that the decision below threatens to create a new and substantial barrier to free international trade, thereby threatening the business of AAEI members.

CWT is a national, nonprofit association devoted to promoting free international trade for the economic benefit of consumers in the United States and worldwide. CWT is a leading spokesman for the interests of consumers in opposing trade restraints such as those created by the decision below.

AAEI and CWT have direct and substantial interests in the preservation of free and open markets in which importers may sell high-quality goods to consumers at reasonable prices. To this end, they have consistently opposed policies which erect protectionist trade barriers that threaten to deny to importers the ability to compete, and to American consumers the benefits of unfettered interbrand competition.

In submitting the accompanying brief supporting the petition for a writ of certiorari, AAEI and CWT emphasize that they have no direct interest in the outcome of this litigation. However, they believe that the issues raised by the decision of the Court of Appeals for the Third Circuit are of such overriding importance to importers and consumers that they require review by this Court. The fundamental purpose of the antitrust laws is to foster and promote price competition for the benefit of consumers. Yet the decision below—by permitting U.S.

producers to pursue burdensome antitrust claims against foreign producers because the latter are selling in the United States at *low* prices—would inevitably tend to inhibit price competition. The accompanying brief addresses the concern of AAEI and CWT over the potential misuse of the antitrust laws for protectionist purposes permitted by the lower court's decision. We submit that AAEI and CWT are in a better position than the petitioners or any other party to set forth the significance of the decision below upon importers generally and upon consumers.

AAEI and CWT therefore move for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-2004

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BRIEF OF AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS AND CONSUMERS FOR WORLD TRADE AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36 of the Rules of this Court, the American Association of Exporters and Importers ("AAEI") and Consumers for World Trade ("CWT") respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

INTRODUCTION

In this lawsuit, two domestic manufacturers have accused an entire foreign industry of engaging in a twenty-year conspiracy to destroy the American consumer electronic products industries by setting parallel low prices in the United States in violation of the antitrust laws. AAEI and CWT submit that it would be extremely harmful to the interests of importers and consumers, as well as contrary to established judicial interpretation, if low pricing—*i.e.*, behavior entirely consistent with unrestrained price competition—was deemed evidence of an antitrust conspiracy.

The decision below departs from established Supreme Court authority and threatens to deter foreign producers from engaging in the very conduct that the antitrust laws are designed to encourage. The lower court held that a predatory export conspiracy among foreign manufacturers may be inferred from evidence of allegedly parallel low prices, rebating, and new market entry—without regard to whether the challenged conduct is consistent with independent economic self-interest. In an ordinary competitive market, however, a new entrant charges low prices, and other competitors cut their prices to match. To view this behavior as evidence of an antitrust conspiracy is to turn antitrust law on its head. Indeed, it is behavior *varying* from this pattern that would indicate a possible conspiracy to restrain price competition. If not reviewed by this Court, the decision below could deter aggressive price competition and cause sharp increases in the prices of imported products and of products subject to import competition—results that would be wholly at odds with basic antitrust policy.

In addition, we note that domestic firms being injured by low-priced foreign competition have ample relief available under the United States trade laws. These laws were designed after extensive multilateral negotiations to take into account the international obligations of the United States in the trade area and to create procedures that provide swift and fair remedies. The lower court's interpretation of the antitrust law will permit domestic firms to evade this established trade remedy system

and allow them to burden foreign competitors with expensive and time-consuming litigation under laws that were never intended to apply to those circumstances.

INTEREST OF THE AMICI CURIAE

The interests of AAEI and CWT in this matter are set forth in the accompanying motion for Leave to File Brief as Amici Curiae.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE QUESTION PRESENTED: IF AN ANTITRUST CONSPIRACY COULD BE INFERRED FROM PRICE COMPETITION— AS THE LOWER COURT CONCLUDED— PRO-COMPETITIVE CONDUCT WOULD BE DETERRED AND CONSUMERS AND IMPORTERS WOULD SUFFER

The antitrust laws have been described by this Court as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958). Those laws were never intended, nor should they be invoked, to promote protectionist ideologies. The courts must be vigilant to distinguish meritorious antitrust claims from vexatious claims asserted by firms seeking shelter from the rigors of competition.[1]

The controlling standard for evaluating the claims in a case such as this was enunciated in *First Nat'l Bank of Arizona* v. *Cities Service Corp.*, 391 U.S. 253, 280 (1968), which required

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[1] *See Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1470 (1984) ("Permitting an agreement to be inferred merely from the existence of [ambiguous evidence] could deter or penalize perfectly legitimate conduct."); *Buffalo Courier-Express, Inc.* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition."); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979) (courts must "be mindful lest the Sherman Act be invoked perversely in favor of those who seek protection against the rigors of competition"), *cert. denied*, 444 U.S. 1093 (1980).

a plaintiff to demonstrate, among other things, acts by the alleged conspirators *in contradiction of their independent economic self-interest.*[2] This rule provides an important analytical safeguard for distinguishing *bona fide* conspiracy claims from meritless ones. It means that a competitor may engage in price competition without fear of vexatious litigation brought by high-cost competitors.

In the present case, the lower court ignored the *Cities Service* doctrine and created a new standard under which an antitrust conspiracy could be inferred from normal, pro-competitive conduct such as low prices and market expansion. This anomalous result poses a significant threat to competition in United States markets. If, as the lower court suggests, an actionable antitrust conspiracy may be inferred from parallel conduct which is perfectly consistent with the independent economic self-interest of foreign manufacturers, aggressive price competition will inevitably be chilled, and both importers and consumers will be harmed.[3]

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[2] *See, e.g., Proctor* v. *State Farm Mut. Auto Ins. Co.*, 675 F.2d 308, 327 (D.C. Cir.) ("Only when the observed parallel behavior is inconsistent with the behavior to be expected from each actor individually pursuing its own economic interest may an agreement be inferred from the parallel conduct."), *cert. denied*, 594 U.S. 839 (1982). *Cf. Monsanto* v. *Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1471 (1984) (to infer a vertical price fixing conspiracy, "there must be evidence that tends to exclude the possibility of independent action").

[3] The Third Circuit further suggests that an actionable conspiracy may be inferred from evidence that various foreign producers may have charged parallel higher prices in their home market than in the United States. We are aware of no basis, however, for the proposition that an absence of price competition in an overseas market violates the United States antitrust laws. To the contrary, it is the absence of antitrust laws in foreign countries that frequently has led to higher prices than in the free, competitive United States market. High-cost domestic producers may yearn for the freedom from competition that prevails in some foreign markets, but they should not be permitted to employ, of all things, the antitrust laws to inhibit competition here.

A foreign producer seeking to enter the United States market with an unknown and unproven product has a special incentive to respond to the demands of American customers.[4] It is, therefore, hardly surprising that such producers may find it necessary to sell at low prices and grant price concessions to break into the market. Such practices are neither sinister nor indicative of collusion; to the contrary, they constitute normal, pro-competitive behavior which should be encouraged by the antitrust laws.[5] *Cf. Great Atl. & Pac. Tea Co.* v. *Federal Trade Commission*, 440 U.S. 69, 80 (1979) ("In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices."). The ultimate beneficiary of such competition is, of course, the American consumer.

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[4] This is particularly true in an industry populated by large domestic suppliers, such as Zenith, General Electric, and RCA, whose products have achieved substantial consumer recognition and loyalty.

[5] If United States companies believe that low-priced imports result from "dumping" by or "subsidies" to foreign competitors, there is ample relief available under the United States unfair trade laws. *See* 19 U.S.C. §§ 1671, *et seq.* (countervailing duties); 19 U.S.C. §§ 1673, *et seq.* (antidumping duties). Moreover, relief in the form of quotas or additional duties may be available even when there is no evidence of unfair competition. *See, e.g.*, 19 U.S.C. §§ 2251, *et seq.* (relief from injury caused by import competition). The novel interpretation of antitrust law proposed by the lower court is not needed to provide relief from such low-priced foreign competition.

CONCLUSION

For the foregoing reasons, AAEI and CWT respectfully urge that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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